Anna St. John
COMPETITIVE ENTERPRISE INSTITUTE
CENTER FOR CLASS ACTION FAIRNESS
1899 L Street NW, 12th Floor
Washington, DC 20036
Phone: (917) 327-2392
Email: anna.stjohn@cei.org

Attorney for Objector Michael James Barton

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CHRISTINE RODRIGUEZ, SANDRA BURGA, KAREN MALAK, JAMES TORTORA, LISA BRUNO, JANEEN CAMERON, KAREN McBRIDE, ANDREW WOOLF, and **BRAD BERKOWITZ**, individually, and for all others similarly situated, Plaintiffs, -against- **IT'S JUST LUNCH INTERNATIONAL, IT'S JUST LUNCH, INC., HARRY and SALLY, INC, RIVERSIDE COMPANY, LOREN SCHLACHET, IJL NEW YORK CITY FRANCHISE, IJL ORANGE COUNTY FRANCHISE, IJL CHICAGO FRANCHISE, IJL PALM BEACH FRANCHISE, IJL DENVER FRANCHISE, IJL AUSTIN FRANCHISE, IJL LOS ANGELES-CENTURY CITY FRANCHISE,** and **DOES 1-136**, Defendants.	Index No. 07-CV-9227 (SHS)(SN) **DECLARATION OF THEODORE H. FRANK**

I, Theodore H. Frank, declare as follows:

1. I have personal knowledge of the facts set forth herein and, if called as a witness, could and would testify competently thereto.

2. My business address is Competitive Enterprise Institute, 1899 L St. NW, 12th Floor, Washington, DC 20036. My telephone number is (202) 331-2263. My email address is ted.frank@cei.org.

3. I founded the Center for Class Action Fairness ("CCAF" or the "Center") in 2009. CCAF litigates on behalf of class members, which it represents *pro bono*, against unfair class-action procedures and settlements. *See, e.g.*, *Pearson v. NBTY, Inc.*, 772 F.3d 778, 787 (7th Cir. 2014) (Posner, J.) (praising CCAF's work); *In re Dry Max Pampers Litig.*, 724 F.3d 713, 716-17 (6th Cir. 2013) (describing CCAF's client's objections as "comprehensive and sophisticated" and noting that "[o]ne good objector may be worth many frivolous objections in ascertaining the fairness of a settlement") (rejecting settlement approval and certification); Adam Liptak, *When Lawyers Cut Their Clients Out of the Deal*, N.Y. TIMES, Aug. 13, 2013, at A12 (calling CCAF's found "[t]he leading critic of abusive class-action settlements"). Our objections have won tens of millions of dollars for class members. *E.g.*, *McDonough v. Toys 'R' Us, Inc.*, 80 F. Supp. 3d 626 (E.D. Pa. 2015); *In re Citigroup Sec. Litig.*, 965 F. Supp. 2d 369 (S.D.N.Y. 2013).

4. On October 1, 2015, the Center merged with the much larger Competitive Enterprise Institute ("CEI"), to take advantage of the economies of scale realized by eliminating some of the enormous fixed costs required for bureaucratic administration of and regulatory compliance by non-profits. The Center was on financially sound footing, but a disproportionate amount of attorney time was taken up with non-litigation tasks, and we were not large enough to hire full-time communications, fundraising, or regulatory-compliance staff.

5. In my experience, it is not uncommon for class counsel to try to undermine a meritorious objection and distract the court from the merits by making *ad hominem* attacks against CEI, CCAF, our attorneys, and even our clients. While I cannot know in advance whether class counsel here will

undertake such unscrupulous tactics, I provide this declaration to give the Court an overview of CCAF and its work and thereby preempt any such baseless attacks or mischaracterizations in the present case.

The Center for Class Action Fairness

6. CCAF's mission is far different from the agenda of those who are termed "professional objectors." A "professional objector" is a specific legal term referring to for-profit attorneys who attempt or threaten to disrupt a settlement unless plaintiffs' attorneys buy them off with a share of the attorneys' fees. Some courts presume that such objectors' legal arguments are not made in good faith. *See* Edward Brunet, *Class Action Objectors: Extortionist Free Riders or Fairness Guarantors*, 2003 U. CHI. LEGAL F. 403, 437 n.150 (2003). This is not CCAF's modus operandi. *See* Paul Karlsgodt & Raj Chohan, *Class Action Settlement Objectors: Minor Nuisance or Serious Threat to Approval*, BNA: CLASS ACTION LITIG. REPORT (Aug. 12, 2011) (distinguishing CCAF from professional objectors). CCAF refuses to engage in *quid pro quo* settlements, and has never withdrawn an objection in exchange for payment. Instead, it is funded entirely through charitable donations and court-awarded attorneys' fees.

7. The difference between a so-called "professional objector" and a public-interest objector is a material one. As the federal rules are currently set up, "professional objectors" have an incentive to file objections regardless of the merits of the settlement or the objection. In contrast, public-interest objector counsel such as CCAF has to triage dozens of requests for *pro bono* representation and dozens of unfair class action settlements, loses money on every losing objection (and most winning objections) brought, can only raise charitable donations necessary to remain afloat by demonstrating success, and has no interest in wasting limited resources and time on a baseless objection. CCAF objects to only a small fraction of the number of unfair class action settlements it sees; indeed, I personally object to only a fraction of the number of unfair class action settlements where I am a class member. (While one district court called me a "professional objector" in the broader sense, that court stated that it was not meant pejoratively, and awarded CCAF fees for a successful

objection and appeal that improved the settlement for the class. *Dewey v. Volkswagen*, 909 F. Supp. 2d 373 396 n.24 (D.N.J. 2012).)

8. Even when approached by a potential client wishing to object to a settlement, CCAF does not pursue objections that it does not believe to be meritorious. We are presented with numerous opportunities to bring meritorious objections or appeals every year that we are unable to pursue because of lack of resources. Every objection we bring on behalf of a class member has the opportunity cost of not having time to pursue a meritorious objection in another case. CCAF turns down the opportunity to represent class members wishing to object to settlements or fees when CCAF believes the underlying settlement or fee request is relatively fair.

9. CCAF does not have any political, ideological, or corporate mission against class actions; our mission instead is to promote fairness in class actions and thereby ensure that the interests of harmed class members are better served. As a child, I admired Ralph Nader and consumer reporter Marvin Zindler (whose autographed photo was one of my prized childhood possessions), and read every issue of *Consumer Reports* from cover to cover. I have focused my practice on conflicts of interest in class actions because, among other reasons, I saw a need to protect consumers that no one else was filling, and as a way to fulfill my childhood dream of being a consumer advocate. I have publicly stated my support for the class-action mechanism as a means of aggregating litigation of similarly situated class members, including in multiple declarations under oath, and in a nationally-broadcast C-SPAN panel discussing CCAF's work. On multiple occasions, successful objections brought by CCAF have resulted in new class-action settlements where the defendants pay substantially more money to the plaintiff class.

CCAF's Independence from CEI Donors and Attorney-Fee Considerations

10. Some of the unfounded attacks against CCAF in previous cases have focused on the source of donations to CEI. Prior to its merger with CEI in October 2015, CCAF never took or solicited money from corporate donors. CEI does take a small percentage of its donations from corporate donors. As part of the merger agreement, I negotiated a commitment that CEI would not permit

donors to interfere with CCAF's case selection or management. In the event of a breach of this commitment, I am permitted to treat the breach as a constructive discharge entitling me to substantial severance pay.

11. Given that CEI's litigation history includes several lawsuits against the interests of some of its corporate donors, and based on my own experience working at CEI over the past six months, I have every confidence that I will have the autonomy for which I negotiated. For example, we are pursuing an appeal opposed by one of CEI's donors; I learned only by happenstance from my own research into the defendant's actions that the defendant was a CEI donor, because no one at CEI raised the issue with me or interfered with my decision to prosecute the appeal.

12. None of the corporate donors to CEI have earmarked contributions to CCAF. The only one of CEI's donors with whom I've discussed his specific views on class actions took great pains to emphasize to me that he did not oppose all class actions and wanted to ensure that our litigation was not taking such a radical position; it does not. In any event, to my knowledge, no corporate or other donors to CEI were aware of CEI's decision to represent Mr. Barton in his objection in the proposed settlement at issue here, and the CCAF attorneys' decision to accept this case was independent of any discussions with any donors. CCAF has a small staff of attorneys and an annual budget of under a million dollars, which it uses to represent class members *pro bono* to protect them from abusive class-action settlements.

13. CEI was willing to merge with CCAF because it supported CCAF's pro-consumer mission and success in challenging abusive class-action settlements and fee requests. I generally support CEI's dedication to free enterprise and individual liberty. But it is a large organization with a diverse group of scholars and attorneys, and some of them take public-policy positions I disagree with. Those controversial positions should not be used to tar CCAF's arguments, attorneys, or clients' objections. For example, some (though not all) CEI experts take controversial positions on climate change; not that it is remotely relevant to this case, but I believe in anthropogenic global warming, and would support a Pigouvian tax on carbon emissions. I haven't done an inventory of every CEI

position paper and don't have a full accounting of what other CEI positions I agree or disagree with, and have no idea where the other four CCAF attorneys or CCAF's clients stand on most non-class-action policy issues.

14. While CCAF is funded entirely through charitable donations and court-awarded attorneys' fees, the possibility of a fee award never factors into the Center's decision to accept a representation on behalf of the Center or object to an unfair class-action settlement or fee request. Indeed, tax law prohibits CCAF from selecting its cases based on the probability of receiving attorneys' fees. *See* Internal Revenue Manual 4.76.9.5. We do not intend to seek attorneys' fees in this case unless our objection results in a material pecuniary improvement in the class's position.

15. CCAF's history in requesting attorneys' fees reflects this approach. Despite having made dozens of successful objections and won millions of dollars on behalf of class members, CCAF has not requested attorneys' fees in the majority of its cases, or even in the majority of its appellate victories. CCAF regularly passes up the opportunity to seek fees to which it is legally entitled. In *Classmates.com*, for example, CCAF withdrew its fee request and instead asked the district court to award money to the class; the court subsequently found that an award of $100,000 "if anything" "would have undercompensated CCAF." *In re Classmates.com Consol. Litig.*, No. 09-cv-0045-RAJ, 2012 U.S. Dist. LEXIS 83480, at *34 (W.D. Wash. June 15, 2012). In other cases, CCAF has asked the court for a fraction of the fees to which it would be legally entitled based on the benefit CCAF achieved for the class and asked for any fee award over that fractional amount to be returned to the class settlement fund. CCAF has sought fees or district-court costs in only fourteen of our cases in our six-year history, and district courts agreed to award those fees twelve out of the fourteen times.

CCAF's Litigation Record

16. CCAF's attorneys have been objecting to class action settlements for over six years. Plaintiffs' attorneys have a habit of cherry picking a handful of cases in which CCAF's objection was partially criticized by the court in an effort to undermine our objections in different cases. Often, the plaintiffs' attorneys cite these cases misleadingly and without the relevant context. I seek to preempt

any rehash of those mischaracterizations here by addressing a couple of the most commonly cited examples.

17. As one example, in *Lonardo v. Travelers Indemnity Co.*, 706 F. Supp. 2d 766, 804 (N.D. Ohio 2010), the court criticized a single policy-based argument by CCAF as supposedly "short on law"; however, CCAF ultimately was successful in the Seventh and Ninth Circuits on that same argument. *See In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d 935 (9th Cir. 2011) (agreeing that reversionary clauses are a problematic sign of self-dealing); *Pearson v. NBTY, Inc.*, 772 F.3d 778 (7th Cir. 2014) (same). Moreover, the court in *Lonardo* stated its belief that "Mr. Frank's goals are policy-oriented as opposed to economic and self-serving" and even awarded CCAF about $40,000 in attorneys' fees for increasing the class benefit by $2 million. *Lonardo*, 706 F. Supp. 2d at 813-17.

18. As another example, in *City of Livonia Emps.' Ret. Sys. v. Wyeth*, No. 07-cv-10329, 2013 U.S. Dist. LEXIS 113658, the court criticized CCAF's client's objection (after mischaracterizing the nature of that objection); however, the court nevertheless ultimately agreed with my client that class counsel's fee request was too high, and reduced it by several million dollars to the shareholder class members.

19. Twice, district courts criticized our pending appeals as "frivolous." Both times we ultimately won the appeal. CCAF has never been sanctioned under Rule 11 or Fed. R. App. Proc. 38.

20. CCAF's overall track record speaks for itself. We have won tens of millions of dollars for class members and a dozen cases that have been decided to date by federal intermediate courts of appeal. That there are cases in which our objections have not been accepted in full in CCAF's more-than-six-year history not only says little about our track record in general; it also says nothing about the merits of the objection in this particular case.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on April 10, 2016 in Dulles International Airport, Sterling, Virginia.

Theodore H. Frank